



**Minority Media &
Telecom Council**

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November 20, 2012

Gary Epstein, Esq.
Senior Advisor to the Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Dear Gary:

RE: Expanding the Economic and Innovation Opportunities of Spectrum
Through Incentive Auctions, FCC 12-118

In the incentive auctions notice of proposed rulemaking (“NPRM”),¹ the Commission makes great strides toward implementing the Spectrum Act and enabling our country to meet the need for more commercial wireless spectrum. However, the agency’s omission of any reference to a recommendation, made by the Commission’s Advisory Committee on Diversity for Communications in the Digital Age (“Diversity Committee”) to give minorities and women greater opportunities to participate in spectrum-based services, should be corrected promptly to provide sufficient opportunity for notice and comment as well as to comply with Section 309(j) of the Communications Act. Therefore, the Minority Media and Telecommunication Council (“MMTC”) respectfully requests that the Commission issue a brief supplement to the NPRM that would specifically seek comment on the Diversity Committee’s race- and gender-neutral proposal for an Overcoming Disadvantages Preference (“ODP”).²

To establish bidding credits, the Commission proposes to adopt small business size standards previously assigned to the 700 MHz band.³ The NPRM also invites comment on “additional

¹ See Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, Notice of Proposed Rulemaking, 27 FCC Rcd 12357 (Oct. 2, 2012) (“NPRM”).

² See Media and Wireless Telecommunications Bureaus Seek Comment on Recommendation of the Advisory Committee on Diversity for Communications in the Digital Age for a New Auction Preference for Overcoming Disadvantage, Public Notice, 25 FCC Rcd 16854 (December 27, 2010) (“ODP Notice”). The ODP proposal was adopted unanimously by the Diversity Committee on October 14, 2010, after some two years of effort. It can be found on the Committee’s webpage at <http://transition.fcc.gov/DiversityFAC/meeting101410.html> (then follow link to “Recommendation on Preference for Overcoming Disadvantage”) (last visited November 19, 2012). The undersigned was privileged to chair the Diversity Committee’s Constitutional Issues Subcommittee, which offered the ODP proposal.

³ NPRM at ¶¶294-95.

provisions to ensure participation by minority-owned or women-owned businesses,” directing commenters to detail “how such provisions should be crafted to meet the relevant standards of judicial review.”⁴ However, nowhere in the NPRM does the Commission reference its efforts, through the Diversity Committee, to examine how it could establish a race- and gender-neutral system of awarding bidding credits for those who have overcome substantial disadvantages.⁵ Instead, at paragraph 296, the NPRM states only that “[t]o the extent that commenters propose additional provisions to ensure participation by minority-owned or women-owned businesses, they should address how such provisions should be crafted to meet the relevant standards of judicial review.”⁶

As discussed in the NPRM, Section 309(j) sets forth the rules for establishing eligibility for bidding credits in spectrum auctions.⁷ Section 309(j) directs the Commission to develop rules that will “[avoid] excessive concentration of licenses ... disseminating licenses among a wide variety of applicants, including ... businesses owned by members of minority groups and women.”⁸ The Commission is further directed to “ensure that ... businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures[.]”⁹

By failing to specifically mention the ODP proposal as it seeks comment from the public, the Commission may disable itself from building the record necessary to craft new auction rules that comply with 309(j) directives to ensure that minority and women-owned businesses have an opportunity to compete for spectrum licenses. Case law is clear that an agency must act according to Congressional intent “where Congress has directly spoken to the precise question at issue.”¹⁰ Further, the Commission must set out the specifics of a proposal for which it wants to solicit comment in an NPRM, rather than simply relying upon proposals collected from the public as is contemplated by paragraph 296 of the NPRM.¹¹

As the court in Council Tree stated, inferential notice from the comments of others will not satisfy the requirements of the Administrative Procedure Act.¹² An agency cannot “bootstrap

⁴ NPRM at ¶296.

⁵ See generally ODP Notice.

⁶ NPRM at ¶296.

⁷ Id. at ¶293.

⁸ 47 U.S.C. §309(j)(3)(B).

⁹ Id. at §309(j)(4)(D).

¹⁰ Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984).

¹¹ See Prometheus Radio Project v. FCC, 652 F.3d 431, 451 (3d Cir. 2011) (“Prometheus II”) (“The FNPR also did not solicit comment on the overall framework under consideration, how potential factors might operate together, or how the new approach might affect the FCC’s other ownership rules. These were significant omissions.”)

¹² Council Tree Communications v. FCC, 619 F.3d 235, 256 (3d Cir. 2010) (“Council Tree”) (citing Shell Oil Co. v. EPA, 950 F.2d 741, 751 (D.C. Cir. 1991) (internal quotations omitted)).

notice from a comment.”¹³ Parties must not be required “to divine the agency’s unspoken thoughts[.]”¹⁴

The Commission may remedy this omission in the NPRM by issuing a supplement that seeks comment on how the Diversity Committee’s ODP proposal could operate in forward auctions. In that way, the Commission would have before it more complete record upon which it may craft rules on the vital subject of ownership diversity – a subject with which the Third Circuit has thrice expressed concern in recent years.¹⁵

We know all too well how a flawed rulemaking notice produces rules that deny opportunities to new entrants.¹⁶ The Commission simply cannot let that happen again. The contemplated incentive auctions may present the last great opportunity for minorities and women to acquire a significant foothold in wireless spectrum. As discussed in our recent letter to the Commission emphasizing the importance of inclusion in the incentive auction process, our nation cannot afford to repeat the mistakes of the past and foreclose opportunities for the diverse participation that may be offered by the newly available spectrum for commercial wireless services.¹⁷

¹³ Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 549 (D.C. Cir. 1983) (adding that “notice necessarily must come – if at all – from the Agency.”) While final rules need only be a “logical outgrowth” of the proposed regulations, *id.* at 546-47, it cannot be assumed that parties will naturally understand, from nothing more than the sparse language of paragraph 296 of the NPRM, that the Commission specifically meant to solicit comment on, or to consider, a proposal as unique as ODP. ODP premises eligible entity status on an applicant’s efforts and success at overcoming disadvantages that can stem from any of a variety of specifically named factors. Racial or gender discrimination are among the ODP factors, while race and gender, standing alone, are not. Neither ODP’s factors, nor the individual initiative-based concept underlying ODP, are mentioned in the NPRM. Nor would ODP’s specific factors, or ODP’s underlying initiative-based concept springing from the factors, be intuitively obvious even to highly experienced commenters.

¹⁴ Council Tree, 619 F.3d at 254.

¹⁵ See Prometheus II, 652 F.3d at 472 (“ownership diversity is an important aspect of the overall media ownership regulatory framework”) and Council Tree, 619 F.3d at 256 n. 10 (where the Commission did “not appear to have thoroughly considered the impact” of its rules on Designated Entities (“DE’s”)); see also Prometheus Radio Project v. FCC, 373 F.3d 372, 421 n. 59 (3d Cir. 2004) (“Prometheus I”) (subsequent history omitted) (requiring the Commission, on remand, to consider specific proposals that parties made that could advance minority ownership).

¹⁶ See Council Tree, 619 F.3d at 248 (where “in auctions held prior to the new rules, DEs had won, on average, 70% of the licenses by dollar value[.]” after the flawed rulemaking “DEs won only 4% of the spectrum licenses”).

¹⁷ See Letter From David Honig, MMTC, to Hon. Julius Genachowski, Chairman, Federal Communications Commission, *et. al.*, re: Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions (September 19, 2012) (offering questions for the pending proceeding that would address the possible structure and impact of incentive auctions on minority participation in FCC regulated industries, including “what tools should the Commission utilize to foster Designated Entity participation? ... Should the Commission restore license

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Thus it's vital that the rulemaking process is ironclad in providing the public with a full opportunity to develop the record on how the Commission can promote diversity and meet Congress' expectations as expressed in Section 309(j).

We would be glad to confer with you and your staff on how best to handle this issue.

Sincerely,

A handwritten signature in blue ink, appearing to read "David Honig", is placed over a light pink rectangular background.

David Honig
President

spectrum set-asides in a fashion similar to that of the Commission's first major auctions of PCS and other spectrum licenses? Should the Commission incorporate the preference for overcoming disadvantages in conjunction with these auctions?")